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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 340

ROY E. BLACK, G. HERBERT FEICK, EDGAR M. FLEWELLYN, ROBERT E. KEMP, EVERETT D. MILBURN, SR., WILLIAM K. STROBEL and ELMER V. YOUNG,

Petitioners,

vs.

THE ROLAND ELECTRICAL COMPANY, a body corporate,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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The Daily Record Co., Baltimore 3, Md.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Roy E. Black, G. Herbert Feick, Edgar M. Flewellyn, Robert E. Kemp, Everett D. Milburn, Sr., William K. Strobel and Elmer V. Young, pray that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit

(69-84)*, rendered August 12, 1947, reversing in part the decision and judgment of the District Court of the United States for the District of Maryland (51-63), and holding that a part of petitioners' claims for unpaid overtime compensation under the Fair Labor Standards Act is barred by limitations.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case originated in an action under the Fair Labor Standards Act of 1938, 52 Stat. 1069 (29 U. S. C., 216) by seven employees, petitioners herein, against their employer, The Roland Electrical Company, a body corporate, respondent, filed March 13, 1945, in the District Court of the United States for the District of Maryland to recover unpaid overtime compensation, liquidated damages and an attorney's fee. Trial of this case was delayed pending final rejection of respondent's contention that it was not subject to the terms of the Act (*Roland Electrical Co. v. Walling*, 326 U. S. 657).

The claims for overtime compensation embraced the period from October 24, 1939, the effective date under the Act of the 42-hour week, to January 10, 1945, when respondent began to comply with the Act. Respondent's first defense, as averred in its answer (10-14) to the complaint (1-10) and as presented by its evidence at the trial, was that petitioners had been paid in excess of any amounts due under § 7 of the Act. Its second defense invoked the 3-year statute of limitations of Maryland, § 1, Article 57, Code of Public General Laws of Maryland (Flack's 1939 Ed.), [illegible] to actions on simple con-

* Figures in parentheses are page numbers of the printed record, unless otherwise indicated.

tract. Petitioners' position on the matter of limitations was that the Maryland law supplied the rule of decision in the case and required the application of the 12-year statute of limitations of Maryland, § 3, Article 57, of the Maryland Code, applicable to actions upon specialties, because the Maryland rule is that where liability is created by the positive requisitions of a statute, as was the liability of respondent under the federal statute here, an action to recover such liability is upon a specialty.

The Court of Appeals of Maryland, the highest court of the State, has never passed upon the matter of the applicability of its statutes of limitations to actions to enforce liability under the Act. However, the Baltimore City Court, a lower State court of competent jurisdiction to entertain these actions, on March 15, 1942, in *Manhoff v. Thomsen-Ellis-Hutton Co.*, 6 Labor Cases, 61,498*, squarely held that an action under the Act is an action upon a specialty within the meaning of the 12-year statute of limitations of Maryland. A decision of the District Court of Maryland in *Bright v. Hobbs*, (1944), 56 F. Supp. 723, has flatly held likewise. Petitioners, in support of their position that the 12-year statute of limitations applied to this case, relied upon the decision of the Baltimore City Court which, itself, faithfully expresses the law of Maryland as declared in an unbroken line of decisions of the Court of Appeals construing and applying the State statutes of limitations in related situations. The *Manhoff* and *Bright* cases are the only reported decisions in the jurisdiction of Maryland passing upon the matter of limitations as applied to actions under the Act, filed prior to the effective date of

* For ready reference the complete text of the opinion of the Baltimore City Court in *Manhoff vs. Thomsen-Ellis-Hutton Co.* is printed in the appendix to the brief in support of this petition (infra, following p. 45).

a new limitations statute, added by Laws of 1945, Chapter 518, not controlling here, and an exhaustive search of the records in this jurisdiction has failed to reveal any unreported decision contrary to the holding in those cases.

As shown in detail in the brief in support hereof (*infra*, pp. 22-27), the Baltimore City Court is a State court whose original jurisdiction in Baltimore City, the Eighth Judicial Circuit of Maryland, in civil cases at common law is unlimited in scope and amount. Its judgments and decisions, as are those of the other common law courts of Maryland, are reviewable only by the Court of Appeals of Maryland. There is no intermediate court in Maryland having appellate jurisdiction solely. In addition to its common law original jurisdiction and that possessed by other common law courts both in Baltimore City and the other judicial circuits in Maryland, the Baltimore City Court, by both Constitutional and statutory provisions, is vested with appellate jurisdiction in numerous and varied matters. In many of these its decisions on facts is final, and in some its conclusions of law, except as to matters of jurisdiction, are not reviewable by the Court of Appeals.

Upon trial of this action the District Court found for petitioners in a written opinion (51-62) which, however, discussed only the questions raised by respondent's first defense, concerning alleged set-offs for purported overpayments of compensation and Christmas bonuses, and did not refer to the matter of limitations which the parties assumed had been definitely settled beyond question in this jurisdiction. Thereafter, the District Court's order (62-63) was entered directing that petitioners recover against respondent amounts totalling $3541.52, which included liquidated damages. That amount was in accordance with a stipulation of the parties as to the amounts of

the respective recoveries in the event of the denial of respondent's defenses. The District Court also awarded petitioners' counsel a fee of $500.

On respondent's appeal the Circuit Court of Appeals for the Fourth Circuit affirmed the District Court's decision in so far as it concerned the denial of the defenses of set-off embraced in respondent's first defense, but reversed the District Court's ruling on the matter of limitations. The holding on appeal acknowledged that "A decision directly applicable, contrary to the one we have reached, was rendered in *Manhoff v. Thomsen-Ellis-Hutton Co.*, 6 Labor Cases, 61,498, by Judge Eli Frank, an able and experienced member of the Supreme Bench of Baltimore City," yet held, further, that that decision "under the rulings of the Supreme Court is not binding on us" (77).

The conclusion of the court below was that this action was the equivalent of one brought to recover on simple contract rather than to enforce a statutory liability and that, consequently, the 3-year period of limitations under § 1, Article 57, of the Maryland Code, applicable to actions on simple contracts, rather than the 12-year period under §3 of the same Article, applied. The effect of that holding is to bar the amounts of all claims accruing prior to March 13, 1942, suit having been filed March 13, 1945. The amount of the recovery is thus reduced by approximately $1200, or about 35% of the total recovery allowed petitioners by the District Court. The further direction of the court below that upon the remand of the case consideration be given to the effect of § 11 of the Portal-to-Portal Act of 1947 as regards the allowance of liquidated damages does not affect the matter of limitations which the court below decided.

As hereinabove mentioned, it is also to be noted that effective June 1, 1945, a new section, 19, was added to

Article 57 of the Maryland Code by Laws of 1945, Chapter 518, prescribing a 3-year period of limitations for actions under the Fair Labor Standards Act. While this action is not governed by the new section, which became effective after this suit was brought, the passage of this new limitations statute would seem relevant to the inquiry as to what the Maryland rule of limitations was prior to the effective date of the newly enacted statute of limitations. The validity of the new section was challenged but sustained by the District Court in *Swick v. Glenn L. Martin Co.*, 68 F. Supp. 863, affirmed on appeal to the court below in *Swick v. Glenn L. Martin Co.*, 160 F. 2d 483. Certiorari was applied for in that case on August 15, 1947, and is now pending in this Court (No. 265, October Term, 1947).

The importance and substantiality of the questions herein presented are shown by the allegations of a petition (64-67) filed by William L. Marbury, Esquire, of the Baltimore Bar, for leave to file a brief and participate in the argument in the court below as *amicus curiae* for the purpose of urging that the 3- and not the 12-year period of limitations is applicable herein. The allegations of Mr. Marbury's petition, on which the court below granted him leave to participate as *amicus curiae*, reveals that, while no undisposed of suits under the Act are pending in the state courts, there are suits in which Mr. Marbury is counsel for employers pending in the federal District Court for Maryland in which "hundreds of thousands of dollars will certainly be eliminated from the pending actions in which he appears as counsel if the ruling of the lower court on the question of limitations is reversed" (67).

B.

JURISDICTION.

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. This proceeding involves questions arising under the Fair Labor Standards Act of 1938, as amended (29 U. S. C., §§201, et seq.), and §§1 and 3 of Article 57, "Limitation of Actions," of the Code of Public General Laws of Maryland (1939 Ed.). The judgment of the Circuit Court of Appeals was entered August 12, 1947 (84).

C.

QUESTIONS PRESENTED.

1. Where the only apposite state court decision determining the meaning and effect of state statutes of limitations in their application to actions by employees against their employers under the Fair Labor Standards Act is that of a state court not the highest, but next to the highest, in the judicial system of the state, may a federal court in that jurisdiction in a proceeding by employees under the Act refuse to follow such decision?

2. If the federal court may so refuse to follow the decision of such state court, there is presented the question whether the court below, in reaching a conclusion directly contrary to that of the state court, erred in holding that under the law of Maryland an action by employees to enforce liability of their employer under the Fair Labor Standards Act is an action on simple contract within the meaning of § 1, Article 57, of the Maryland Code, barred after three years from the date the cause of action accrued, rather than an action upon a liability created by statute and thus a specialty within the meaning of §3 of Article 57, prescribing a limitation period of twelve years.

D.

STATUTES INVOLVED.

The provision of the Fair Labor Standards Act most pertinent to the determination of the questions here presented is § 16(b), as amended, 29 U. S. C., § 216(b), as follows:

> "(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The Maryland statute of limitations determined by the court below to be applicable to this action is § 1, Article 57, Code of Public General Laws of Maryland (1939 Ed.), as follows:

> "All actions of account, actions of assumpsit, or on the case, except as hereinafter provided, actions of debt on simple contract, detinue or replevin, all actions for trespass for injuries to real or personal property, all actions for illegal arrest, false imprisonment, or violation of the twenty-third, twenty-sixth, thirty-first and thirty-second articles of the declaration of rights, or any of them, or of the existing, or any future provisions of the code touching the writ of habeas

corpus, or proceedings thereunder, and all actions, whether of debt, ejectment or of any other description whatsoever, brought to recover rent in arrear, reserved under any form of lease, whether for ninety-nine years renewable forever, or for a greater or lesser period, and all distraints issued to recover such rent shall be commenced, sued or issued within three years from the time the cause of action accrued; and all actions on the case for libel and slander and all actions of assault, battery and wounding, or any of them, within one year from the time the cause of action accrued; this section not to apply to such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants who are not residents within this State."

The Maryland statute of limitations whose application to this action was rejected by the court below but is urged by petitioners is §3, Article 57, of the said Maryland Code, as follows:

"No bill, testamentary, administration or other bond (except sheriffs and constables' bonds), judgment, recognizance, statute merchant, or of the staple or other specialty whatsoever, except such as shall be taken for the use of the State, shall be good and pleadable, or admitted in evidence against any person in this State after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action is above twelve years' standing; provided, however, that every payment of interest upon any single bill or other specialty shall suspend the operation of this section as to such bill or specialty for three years after the date of such payment; saving to all persons who shall be under the aforementioned impediments of infancy or insanity of mind the full benefit of all such bills, bonds, judgments, recognizances, statute merchant, or of the staple or other specialties, for the period of six years after the removal of such disability."

The provisions added to the limitations statutes of Maryland by Laws of 1945, Chapter 518, effective subsequent to the filing of this action and not controlling hereof yet whose provisions petitioners submit to be relevant to the determination of the questions herein presented is § 19, Article 57, of the said Maryland Code, as follows:

> "All actions brought by or on behalf of any employee or employees for the recovery of unpaid minimum wages, unpaid overtime compensation, fees and/or penalties, as the case may be, under the Fair Labor Standards Act of 1938, as amended, shall be brought within three years from the time such cause or causes of action accrued, unless such Fair Labor Standards Act shall prescribe a different period within which such action or actions may be brought; provided, however, that all such subsisting causes of action which accrued more than two years before June 1, 1945, shall be sued on within one year after June 1, 1945, unless such Fair Labor Standards Act shall provide a different period within which such causes of action may be sued on."

E.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals, in holding that it could refuse to follow the decision of the Baltimore City Court in the *Manhoff* case determining the meaning and effect of state statutes of limitations specifically in their application to actions under the Fair Labor Standards Act, has decided a federal question in a way in conflict with applicable decisions of this Court. It is definitely settled by the decisions of this Court that it is federal policy to adapt the local law of limitations where a federal act prescribes no period of limitations for actions on it. In all cases "where the state law supplies the rule of decision"

(*Fidelity Union Trust Co. vs. Field*, 311 U. S. 169, 177) this Court has explicitly imposed upon the federal courts not merely a prerogative but a positive duty to ascertain and apply state law even though it has not been expounded by the highest court of the state. This Court has held, further, that "a state is not without law save as its highest court has declared it" (*West vs. American Telephone and Telegraph Co.*, 311 U. S. 223, 236), that an intermediate state court in declaring and applying the state law is acting as an organ of the state, and that its determination should be followed by a federal court in deciding a state question. This policy, and that enacted and expressed in § 34 of the Judiciary Act, would clearly seem to have required that the court below, in the absence of any apposite decision by the highest court of the state, follow the decision of the Baltimore City Court in the *Manhoff* case, particularly in view of the fact that that determination is precisely in point and thus must concededly be taken as the best and most convincing evidence of what the state law is.

The Baltimore City Court is a state court of Maryland, next in rank below the Court of Appeals of Maryland, the highest court of the state. While Maryland has no intermediate appellate court of state-wide jurisdiction, the appellate jurisdiction conferred upon the Baltimore City Court by the Constitution and statutes of Maryland brings it in close analogy to intermediate appellate courts of other states. Its decisions upon facts when sitting as an appellate tribunal are generally final and not appealable, and in many cases its conclusions of law are not reviewable by the Court of Appeals except on jurisdictional points. Its appellate jurisdiction in magistrates' cases and those from the People's Court of Baltimore City, while generally embracing cases involving small sums of money, is nevertheless

unlimited in amount in appeals in landlord and tenant cases. In common law and civil matters in Baltimore City the original jurisdiction of the Baltimore City Court is unlimited in scope and amount.

Refusal of the court below to follow the decision of a state court of the standing and importance of the Baltimore City Court, in the absence of any apposite decision by the Court of Appeals of Maryland and of any contrary decision of any other court in the jurisdiction, conflicts with the cited and other decisions of this Court. Moreover, the decision in the *Manhoff* case is in perfect accord with previous decisions of the Court of Appeals of Maryland construing and applying generally the Maryland statutes of limitations, and was for years relied upon and followed in Maryland by the lower state and federal courts and by the bar and litigants. Clear evidence of that is found in the decision of the District Court of Maryland in *Bright vs. Hobbs,* 56 F. Supp. 723, decided in 1944 (to which the court below does not refer), reviewing the decisions of the Court of Appeals and holding that an action under the Act is an action upon a liability created by statute and thus a specialty within the meaning of § 3, Article 57, of the Maryland Code, not barred under 12 years.

2. Even if the requirement that state decisions must be followed, declared in § 34 of the Judiciary Act and enunciated in the decisions of this Court, did not impose upon the court below the positive duty to follow the decision of the Baltimore City Court in the *Manhoff* case without its own independent ascertainment of the Maryland law, nevertheless the Circuit Court of Appeals has decided an important question of local law in direct conflict with the decisions of the Court of Appeals of Maryland construing and applying the limitations statutes of

the state. In holding that the Maryland 3-year statute of limitations applicable to suits on simple contracts, and not the 12-year statute of limitations applicable to suits upon specialties, that is, liabilities created by statute, governs actions brought to enforce the liability of an employer to his employees under the Fair Labor Standards Act, the Circuit Court of Appeals has abrogated and reversed the Maryland rule.

The law of Maryland, which at all events must supply the rule of decision in this case on the applicability of limitations statutes, is that where liability is created by the positive requisitions of a statute an action to recover such liability is upon a specialty not barred under 12 years, as provided in §3, Article 57, of the Maryland Code. As the liability and claim for reparations in the instant case are created and imposed exclusively by the provisions of the Fair Labor Standards Act, which, moreover, provides the exclusive remedy sought and but for which this action could not have been maintained, it is upon a specialty within the meaning of the Maryland law.

This Court, in no uncertain language, has admonished the federal courts "to ascertain from *all the available data* what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint 'of general law' * * *" (*West vs. American Telephone and Telegraph Co.*, 311 U. S. 223, 237.) Urged upon the court below as additional evidence of the Maryland law, but given no more than passing reference in a footnote to its opinion, was the passage of Chapter 518, Laws of 1945, of the General Assembly of Maryland, prescribing a 3-year period of limitations for actions under the Fair Labor Standards Act. Unless it be assumed that the Legislature of Maryland enacted a wholly sterile statute, the passage of that act furnishes clear additional evidence

that the State Legislature considered the existing period of limitations to be 12 years. The court below sustained the constitutional validity of the Maryland act of 1945 in *Swick vs. Glenn L. Martin Co.*, 160 F. 2d 483, now pending in this Court on petition for certiorari (No. 265, October Term, 1947).

In departing from and overruling not only the decision in the *Manhoff* case but an unbroken line of decisions of the Court of Appeals of Maryland upon which that case was based, the court below has undertaken the determination of the question of the meaning of the Maryland statutes of limitations on its own reasoning independent of the construction and effect which the Court of Appeals itself accorded to the Maryland statutes.

3. But if the Circuit Court of Appeals was correct in holding itself not bound by the *Manhoff* decision, then it has decided an important question of federal law which has not been, but should be, settled by this Court. It follows necessarily that, if the court below was at liberty to ignore and, indeed, reverse the construction placed on the Maryland statutes of limitations by the Baltimore City Court, it must be because that court is not equal in importance, standing or finality to those lower state courts whose decisions this Court has held to be binding on federal courts. While petitioners submit that such is not the case, and that the Baltimore City Court is, at the very least, equal in importance, jurisdiction and for all relevant purposes with, for example, the Chancery Court of New Jersey, whose decision was held (*Fidelity Union Trust Co. vs. Field*, 311 U. S. 169) to be binding on federal courts, nevertheless the holding of the court below assumes that there is a line of demarcation between those state courts whose decisions must be followed and those whose decisions may be overridden by federal courts, and places a court of

the stature of the Baltimore City Court in the latter class. It is probably correct to assume that such a line must somewhere be drawn, yet surely there is no warrant in the decisions of this Court to draw it, as the court below did, at a point above the Baltimore City Court.

This Court has never decided precisely which state courts are of sufficient standing and dignity so that compliance with their decisions is required by federal courts. As the question is of great public importance concerning the interrelation of state and federal courts it ought to be settled definitely.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of all proceedings in the case numbered on its docket as No. 5600, and entitled as above shown, and that so much of the decision and judgment of the said Circuit Court of Appeals as reverses the judgment of the District Court of the United States for the District of Maryland in this cause may be reversed or modified by this Court, and that petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

PAUL BERMAN,
SIGMUND LEVIN,
THEODORE B. BERMAN,
Counsel for Petitioners.

Baltimore, Maryland,
September 10, 1947.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the court below has not yet been officially reported but the complete text thereof is in the record (69-84). The opinion of the District Court, reported in 68 F. Supp. 117, and included in the record (51-62), does not discuss the questions presented herein.

II.

JURISDICTION.

Jurisdiction is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under Heading A in the petition for writ of certiorari, and for brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In refusing to follow the decision of the Baltimore City Court in the case of *Manhoff vs. Thomsen-Ellis-Hutton Company.**

2. In holding that under the law of Maryland an action by employees to enforce liability of their employer under the Fair Labor Standards Act is an action on simple contract within the meaning of §1, Article 57, of the Maryland Code, barred after three years from the date the cause

* For complete text of opinion see appendix, *infra*, following p. 45.

of action accrued, rather than an action upon a liability created by statute and thus a specialty within the meaning of §3 of Article 57, prescribing a limitation period of twelve years.

V.

ARGUMENT.

A.

The Manhoff decision of the Baltimore City Court, albeit not the highest court of Maryland, holding, in construction of the Maryland Statutes of Limitations, that an action by an employee to enforce his employer's liability under the Fair Labor Standards Act is upon a specialty not barred under twelve years, announced the Rule of Decision in this case and was required to be followed by the Court below.

Even before the decision of this Court in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, the federal courts applied state statutes of limitations in accordance with the interpretations given such statutes by state courts, and the construction so given to a state statute of limitations was regarded as part of the statute, and as binding upon the federal courts as the text thereof. *Moore vs. Illinois Central R. Co.*, 312 U. S. 630, 634. That principle was established not only in cases where federal jurisdiction was conferred by diversity of citizenship but in all actions to enforce federally-created rights where, as here, neither the federal statute whose enforcement was sought nor any other applicable federal statute prescribed a period of limitations. In such cases the silence of congress was interpreted to mean that it was federal policy to adopt the local law of limitations. *McClaine vs. Rankin*, 197 U. S. 154; *McDonald vs. Thompson*, 184 U. S. 71; *Pufahl vs. Park's Estate*, 299 U. S. 217, 225-226; *Rawlings vs. Ray*, 312 U. S. 96; *Cope vs. Anderson*, 67 S. Ct. 1340; *Republic Pictures Corp. vs. Kappler*, 151 F. 2d 543, affmd: 327 U. S. 757 (rehearing den., 327 U. S. 817).

Hence, the policy of this Court pronounced in *Erie Railroad Co. vs. Tompkins, supra,* that it is desirable and necessary that there be identity in the rules of law applicable to the same states of facts, whether presented to a federal or a state court sitting in the same jurisdiction, marked no departure from what has always been federal doctrine so far as the matter of limitations is concerned. State law must be looked to and is controlling where it supplies the rule of decision, and the only question is whether, in the case before the court, the law of the state supplies the rule of decision and not whether jurisdiction is invoked because of diversity of citizenship or under some other provision as in actions under the Fair Labor Standards Act. §34 of the Judiciary Act, 28 U.S.C., §725.

The decisions of this Court defining the principles of the *Erie Railroad* case have stressed that it is the positive duty of the federal courts, "where the state law supplies the rule of decision", to ascertain and apply that law "even though it has not been expounded by the highest court of the state" *Fidelity Union Trust Co. vs. Field,* 311 U. S. 169, 177. That case holds that an intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination should be followed by a federal court in deciding a state question, in the absence of a decision by the highest court of the state or of more convincing evidence of what the state law is.

It is respectfully submitted that the court below could find no more convincing evidence of what the state law is than the decision in the *Manhoff* case, squarely deciding, as it does, the precise question presented to the court below. The ability and experience of the member of the Supreme Bench of Baltimore City who wrote the opinion in the *Manhoff* case, Judge Eli Frank, whose judicial and legal capabilities and talents the Maryland bar unanimously

concedes to be unsurpassed by any contemporary Maryland judge, are acknowledged by the court below (77).

That case is not, moreover, the only direct evidence that the state law prescribes the 12 year period of limitations for actions under the Act. Apart from the fact that the *Manhoff* case declares and is in perfect accord with the law of Maryland as expressed by the Court of Appeals of Maryland in cases dealing generally with the state's statutes of limitations (as argued under Heading B hereunder), there is other direct and convincing evidence, apparently ignored by the court below, of a specific nature fully supporting the conclusion of the *Manhoff* case that the 12-and not the 3-year period of limitations applies to actions under the Act in Maryland. First, there is the decision in 1944 of the District Court for the District of Maryland in *Bright vs. Hobbs*, 56 F. Supp. 723, flatly holding the 12-year period to apply. Secondly, there is the fact of the passage by the Maryland legislature of Chapter 518, Laws of 1945, adding a new section, 19, to Article 57 of the Code of Maryland, and prescribing a 3-year period of limitations for actions brought under the Act. Thus the "available data" (*West vs. American Telephone and Telegraph Co.*, 311 U. S. 223, 237) as to what the state law was, in express and direct relation to the state statutes of limitations as applied particularly to actions under the Act, included decisions by two judges trained in Maryland law and, in addition, an unequivocal expression of state legislative intent explicit in the passage of an act plainly designed to effect a change in the existing period of limitations for actions under the Act.

The *Manhoff* decision in 1942 presented no conflict with any other decision in Maryland. Other than *Bright vs. Hobbs, supra*, there is no reported case in the jurisdiction of Maryland, state or federal, deciding the applicable period

of limitations in an action under the Act, aside from decisions involving Chapter 518, Laws of 1945. It is a fact of general knowledge at the bar of Maryland, which counsel for respondent will not gainsay, that prior to the effective date of the statute enacted by that Chapter, no court in this jurisdiction, state or federal, ever applied the 3-year statute of limitations to an action brought under the Act, and suits thereunder have been many in this jurisdiction. Among the numerous cases in which the District Court of Maryland followed the rule of limitations declared in the *Manhoff* case are the reported cases of *Dize v. Maddrix*, 324 U. S. 697, where the employee was allowed overtime compensation accruing from the effective date of the Act, October 24, 1938, a period beginning five years before the filing of the complaint on October 28, 1943; and *Slover v. Wathen*, 140 F. 2d 288, where the employee was allowed minimum wages and overtime compensation accruing from the effective date of the act, a period of over four years before the filing of the suit in that case in the Baltimore City Court on January 8, 1943.

The Court of Appeals of Maryland has never passed upon the matter of limitations in an action under the Act. A study of the docket of that court reveals no pending case dealing with the matter, so that in view of the provisions of the act of 1945 it seems clear that there is no possibility that the highest court of Maryland will ever be presented with the opportunity to decide the matter, much less to overrule the *Manhoff* decision.

Until the decision of the court below in the instant case, the *Manhoff* case stood as the best and most convincing evidence and exposition of the law of Maryland. It was cited to and followed by all courts in the jurisdiction. It was relied upon by the courts, state and federal, the bar and litigants from the time of its decision until the provisions

of the act of 1945 became effective. It supplied the rule of decision, binding upon the court below, and that court should have followed it. The passing reference in the opinion below to the Baltimore City Court as a court of *nisi prius* jurisdiction makes it clear that the court below considered itself not bound to follow any decision of the state save one directly in point by the Court of Appeals of Maryland. Nevertheless petitioners submit that the position of the Baltimore City Court in the judicial system of Maryland required that its decision be accorded by the federal courts the same weight and respect which this Court has directed must be accorded to intermediate courts of other states.

The Baltimore City Court is and has been for eighty years *a state court of Maryland* of original common law and certain appellate jurisdiction in Baltimore City, its judgments, when appealable, being subject to review only by the Court of Appeals of Maryland, the highest court of the state. The first constitutional provision for the creation of the Baltimore City Court was in the Maryland Constitution of 1864, wherein, by Article IV, Part IV, §41, the General Assembly of Maryland was authorized to provide by law for the establishment of another court for Baltimore City in addition to its two existing courts exercising common law jurisdiction, namely, the Superior Court of Baltimore City and the Court of Common Pleas. Pursuant to that constitutional authority the General Assembly in 1867 (see: 1 *Poe, Pl. & Pr.*, 1925 Ed., par. 27, p. 16) established the Baltimore City Court.

The present Constitution of Maryland, that of 1867 (Vol. 1, Ann. Code of Public General Laws of Maryland, Flack's 1939 Ed., p. 48, *et seq.*), contains the basic provisions concerning the judicial system of the state. Part I, §1, of Article IV, provides that the judicial power of the state shall be vested in a Court of Appeals and specified lower

courts, including "such Courts for the City of Baltimore as are hereinafter provided for", all courts of record. The Court of Appeals is the highest court of the state and the only court of the state whose jurisdiction is co-extensive with its limits. That court has appellate jurisdiction only and is without any original jurisdiction whatever (Const. 1867, Art. IV, §14; *Poe, supra,* par. 10, p. 6).

Baltimore City, which is a municipal corporation separate and distinct from and not a part of any county of Maryland, is designated as the Eighth Judicial Circuit of Maryland. It has six courts, styled the Supreme Bench of Baltimore City, the Superior Court of Baltimore City, the Court of Common Pleas, the Baltimore City Court, the Circuit Court of Baltimore City, and the Criminal Court of Baltimore City (Const. 1867, Art. IV, §27; *Poe, supra,* par. 13, p. 8). The Circuit Court of Baltimore City together with The Circuit Court No. 2 of Baltimore City (the latter established by Acts of 1888, Ch. 194) exercise exclusive equity jurisdiction in Baltimore City. The Criminal Court of Baltimore City together with the Criminal Court Part 2 (established by a Rule of the Supreme Bench of Baltimore City in 1897) have criminal jurisdiction in Baltimore City (*Poe, supra,* par. 32, p. 19).

The Supreme Bench of Baltimore City is composed of the Chief Judge and ten associate judges elected in the Eighth Judicial Circuit (Const. 1867, Art. IV, §31; *Poe, supra,* pars. 22 to 26, pp. 12-16). The functions of the Supreme Bench as a separate court are extremely limited, however, and almost the whole judicial power in Baltimore City is lodged in the respective courts, named above, whose judges compose the Supreme Bench of Baltimore City (*Poe, supra,* par. 13, p. 19).

The judges assigned to sit in the Baltimore City Court, as are all members of the Supreme Bench of Baltimore City, are elected by the voters of Baltimore City for terms of fifteen years (Const. 1867, Art. IV, §3). Vacancies in judgeships are filled by appointment by the Governor of the state, and such appointee holds office until his successor's election (Const. 1867, Art. IV, §5, as amended; see: *Flack's* 1943 Supp. to Code of P. G. L., p. 7). The salary of each of the eleven judges, including the Chief Judge, of the Supreme Bench of Baltimore City, paid to him by the state, is $9500 per annum (Art. 26, §47, Code of P.G.L. of Md., as amended by Laws of 1945, Ch. 889), to which, under authority granted (Const. 1867, Art. IV, §31A), the Mayor and City Council of Baltimore adds, per annum, $3500 for the Chief Judge and $3000 for each of the associate judges.

A judge of the Supreme Bench of Baltimore City may be designated by the Chief Judge of the Court of Appeals to sit in any case or for a specified period as a judge of the Court of Appeals of Maryland, or to sit as a judge in any other judicial circuit of Maryland (Const. 1867, Art. IV, §18A, as amended; see: *Flack's* 1943 Supp. to Code of P.G.L., pp. 9-10; see also, Art. IV, §13A, *supra*, p. 7).

Under the Constitution of 1867 (Art. IV, §28) the Baltimore City Court, the Superior Court of Baltimore City, and the Court of Common Pleas each has concurrent jurisdiction in all civil common law cases in Baltimore City. The concurrent jurisdiction of these three common law courts embraces all civil common law cases where the damages claimed or the debt recovered exceed $100, or where the title to land is involved (*Niles, Maryland Constitutional Law*, p. 265). In addition, the Baltimore City Court has exclusive jurisdiction in all cases of appeal

from judgments of justices of the peace in Baltimore City (Art. 5, §93, Code of P.G.L. of Md.) and appeals arising under the ordinances of the Mayor and City Council of Baltimore (Const. 1867, Art. IV, §28; *Poe, supra,* par. 31, p. 17; *Page vs. Baltimore,* 34 Md. 558, 563). The Baltimore City Court also has exclusive appellate jurisdiction of judgments of the People's Court of Baltimore City, whose jurisdiction includes actions in tort and contract cases involving amounts not exceeding $100, and all landlord and tenant actions in Baltimore City regardless of the amount involved (Const. 1867, Art. IV, Part V-A, §41A, added and ratified in 1940, see: Flack's 1943 Supp. to Code of P.G.L., pp. 14-16; see also, Code of Pub. Loc. Laws of Md., Art. 4, as amended by Laws of 1943, Ch. 969, particularly §§716B and 716P). The decisions of the Baltimore City Court sitting as an appellate tribunal from justices of the peace or the People's Court of Baltimore City are final and not appealable unless a question of jurisdiction is involved. *Wilmer vs. Mitchell,* 122 Md. 299; *Shippler vs. Broom,* 62 Md. 318.

All of the three named common law courts of Baltimore City have concurrent appellate jurisdiction conferred by statute in certain cases, for example, appeals from the Industrial Accident Commission of Maryland (Code of P.G.L., Art. 101, §57, as renumbered by Laws of 1945, Ch. 528). In addition, however, the Baltimore City Court alone has exclusive appellate jurisdiction in numerous other matters not embraced within the jurisdiction of any other court in the Eighth Judicial Circuit of Maryland.

These matters in which exclusive appellate jurisdiction is conferred upon the Baltimore City Court include the following:

Appeals from decisions of the City Council of Baltimore judging the election and qualifications of its members (Balto. City Charter, 1946, §23). Appeals from the Planning Commission of Baltimore City, concerning matters dealing with planning generally, and the issuance of permits for construction work in Baltimore City. Decisions on those appeals, except for questions of law, are final and not reviewable by the Court of Appeals (Balto. City Charter, 1946, §120). Appeals from the Board of Municipal and Zoning Appeals, itself a municipal appellate body, concerning matters of tax assesments, zoning, opening and extending of streets, and paving assessments (Balto. City Charter, 1946, §135). Appeals from decisions of the Board of License Commissioners of Baltimore City, concerning its action respecting liquor licenses in Baltimore City. The decisions of the Baltimore City Court on such appeals are final and not reviewable by the Court of Appeals except for limited questions of law (Art. 2B, §63(1) and (4), Flack's 1943 Supp. to Code of P.G.L. of Md.) Appeals from decisions of the State Board of Censors approving or disapproving motion pictures. The jurisdiction of the Baltimore City Court on those appeals is state-wide (Art. 66A, §19, Code of P.G.L., 1939). Appeals from decisions of the State Tax Commission of Maryland in the exercise of its appellate jurisdiction in matters of taxation, where the property involved is situated or the taxpayer resides in Baltimore City (Art. 81, §194(a), Code of P.G.L., 1939). Appeals from rulings of the Department of Motor Vehicles of Maryland concerning its action on motor vehicle licenses (Art. 66½, §99, Flack's 1943 Supp. to Code of P.G.L. of Md.) Appeals from decisions of the Board of Examiners and Registration of Architects (Art. 43, §468, Code of P.G.L. of Md.). Appeals from decisions of the Board of

Funeral Directors and Embalmers (Art. 43, §338A, Flack's 1943 Supp. to Code of P.G.L. of Md.).

It is obvious, we submit, that the Baltimore City Court is thus more than a mere *nisi prius* court whose decision, in the circumstances disclosed, may be so cavalierly ignored and overridden as the court below has done. After the holdings of this Court in the *Fidelity* and *West* cases, *supra*, we have been unable to find any decision of a Circuit Court of Appeals, other than that in the instant case, refusing to follow a decision of a state court of the rank and standing of the Baltimore City Court. To the contrary, the federal district courts have uniformly held themselves bound to follow such state courts in situations similar to that at bar. *Mallatt vs. Ostrander Ry. & Timber Co.*, (D. C. Ore.), 46 F. Supp. 250; *Stinson vs. Edgemoor Iron Works*, (D. C. Del.), 55 F. Supp. 861; *Lambert vs. Doyle*, (D. C. Pa.), 70 F. Supp. 990; *Schram vs. Safety Inv. Co.*, (D. C. Mich.), 39 F. Supp. 517, 45 F. Supp. 636.

It is, in conclusion on this point, respectfully submitted that the court below should likewise have followed the decision of the Baltimore City Court in the *Manhoff* case which clearly supplied the rule of decision for the case at bar. The language of this Court in its pertinent decisions would seem to have required that that be done. In *Fidelity Union Trust Co. vs. Field*, 311 U. S. 169, this Court, speaking through Mr. Chief Justice Hughes, said (p. 177-178):

> "* * * the majority of the Circuit Court of Appeals took the view that it was not so bound by 'the pronouncements of other state courts' but might conclude that 'the decision does not truly express the state law.' The court held that * * * 'contrary decisions' of the Chancery Court of New Jersey were not binding. * * *

"We think that this ruling was erroneous. The highest state court is the final authority on state law * * *, but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the state. See *Ruhlin vs. New York Life Insurance Co.*, 304 U. S. 202, 209. An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question. * * * in *West vs. American Telephone and Telegraph Co.*, 311 U. S. 223, * * * we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law.

"Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute. That construction and effect are shown by the judicial action through which the State interprets and applies its legislation. That judicial action in this instance has been taken by the Chancery Court of New Jersey and we have no other evidence of the state law in this relation. Equity decrees in New Jersey are entered by the Chancellor, who constitutes the Court of Chancery, upon the advice of the Vice-Chancellors, and these decrees, like the judgments of the Supreme Court of New Jersey are subject to review only by the Court of Errors and Appeals. We have held that the decision of the Supreme Court upon the construction of a state statute should be followed in the absence of an expression of a countervailing view by the State's highest court, * * * and we think that the decisions of the Court of Chancery are entitled to like respect as announcing the law of the State.

"* * * It is the function of the court of last resort to resolve such conflicts as may be created by decisions of the lower courts and except in rare instances that function is performed and the law settled accordingly. Here, however, there is no conflict of decision. Whether there ever will be, or the Court of Errors and Appeals will disapprove the rulings * * * is merely a matter of conjecture. At the present time the * * * cases stand as the only exposition of the law of the State with respect to the construction and effect of the (state) statutes * * *, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning."

In *West vs. American Telephone & Telegraph Co.*, 311 U. S. 223, this Court, speaking through Mr. Justice Stone, said (pp. 236-238):

"* * * the state 'laws' which, by §34 of the Judiciary Act of 1789, are made the 'rules of decision in trials at common law' define the nature and extent of petitioners' right. * * * And the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute. * * * True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. * * * But the obvious purpose of §34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

"A state court is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' * * *.

"Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. * * * Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the *West* case, whether that will ever happen remains a matter of conjecture."

See also:

Six Companies of California v. Joint Highway District, 311 U. S. 180;

Stoner v. New York Life Insurance Co., 311 U. S. 464;

Huron Holding Corp v. Lincoln Mine Op. Co., 312 U. S. 183;

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 543.

B.

In disagreeing with and rejecting the decision in the Manhoff case and holding that an action under the Fair Labor Standards Act is not one to recover a liability created by statute but is merely the equivalent of an action on simple contract, the Court below improperly chose and applied its own Rule of Decision and thereby abrogated the Maryland rule as pronounced in many cases by the highest court of the state, namely, that where liability is created by the positive requisitions of a statute an action to recover such liability is upon a specialty not barred under twelve years.

In holding it to be more logical, upon considerations of "reliability and durability of evidence" (78), to place this action in the 3-year rather than the 12-year category for limitations purposes, the court below amended §3 of Article 57 of the Maryland Code, as construed in an unbroken line of decisions of the highest court of the state (see: IV *Maryland Law Rev.*, 201, 203), by deleting therefrom the word "specialty" or attributing to that term a meaning totally foreign to that which the Maryland courts have always held it to have. Moreover, a closer examination of the Maryland statutes of limitations than apparently accorded to them by the court below reveals no such logical consistency, as to "reliability and durability of evidence," as the court below professes to see in them to support its conclusions here. For example, § 3 prescribes a 12-year period of limitations for an action on any "bill, testamentary, administration or other bond", evidence of accounts under which may well be as ephemeral as evidence to prove the amount due in "actions, whether of debt, ejectment or of any other description whatsoever, brought to recover rent in arrear, reserved under any form of lease, whether for

ninety-nine years renewable forever, or for a greater or lesser period", for which § 1 of Article 57 prescribes a limitations period of but 3 years.

If petitioners' employment was by a written agreement *under seal*, the mere existence of the seal in itself, regardless of all other considerations, would indisputably have constituted the agreement a specialty and made applicable § 3 of Article 57, and the period of limitations 12 years, in a suit to recover merely the basic wages due petitioners under such agreement. *Jones v. Burgess*, 176 Md. 270, and cases cited at page 277; *Frank v. Wareheim*, 179 Md. 59, 64-66; 177 Md. 43, 56-57; *General Petroleum Corp. vs. Seaboard Terminals Corp.*, 23 F. Supp. 137. Does the addition of a seal to a contract affect or even relate to "reliability and durability of evidence" in an action thereunder? Obviously not. Yet, as illogical and inconsistent as it might seem or actually be, the law of Maryland prescribes 12 years as the period of limitations for an action under a sealed contract or instrument, and only 3 years when the identical contract or instrument is unsealed. It is, however, the law of Maryland which must supply the rule of decision here. The law of Maryland may neither logically nor consistently classify actions for limitations purposes, yet it is none the less the law of Maryland.

The long-established and inflexible rule in Maryland is that in all cases where liability is created by the positive requisitions of a statute the liability is in the nature of a specialty and not within the limitations statute applicable to actions on simple contracts. The Fair Labor Standards Act wholly creates the liability for overtime compensation, liquidated damages and attorney's fee and provides the exclusive remedy for their recovery by an employee against

his employer, and absent the Act no right of action whatever could possibly exist for the breach of the duties and obligations it imposes regarding wages and hours.

The court below cites but overrides *Mattare v. Cunningham*, 148 Md. 309, which is not the earliest (see: IV *Maryland Law Review, supra*, 201) but perhaps the leading case in Maryland prescribing the test as to whether a debt sued for is a specialty within the meaning of § 3. That case holds (pp. 315-316):

> "In all cases where liability is created by the positive requisitions of a statute, and not by the act of the parties themselves, the liability is in the nature of a specialty and is not within the Statute of 21 James nor within the statutes adopted in the several States applicable to simple contracts, unless expressly made so.
>
> "The suit upon the award, which is the approved and proper method of enforcing the award of the commission, is simply compelling the full and complete performance by the employer of the obligation imposed by the statute."

The *Mattare* case lays down the test, quoting with approval *Wood on Limitation* (4th ed.), §39, as follows (p. 315):

> " 'The test, whether a statute creates a specialty debt or not, might be said to be whether, independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether independently of the statute a right of action exists for the breach of the duty or obligation imposed by the statute. If so, then the obligation is not in the nature of a specialty, and is within the statute, so long as the common-law remedy is pursued; but if the statute creates the duty or obligation, then the obligation thereby imposed is a specialty, and is not within the statute.

> If the statute imposes an obligation, and gives a special remedy therefor, which otherwise could not be pursued, but at the same time a remedy for the same matter exists at common law independently of the statute, and the statute does not take away the common-law remedy, the bar of the statute is effectual when the common-law remedy for the breach of the common-law duty or liability is pursued, but is not applicable when the special statutory remedy is employed'."

The court below, while conceding that (79):

> "If this description of the test must be taken literally, there would be an end to the discussion, because it cannot be denied that the Fair Labor Standards Act bears heavily upon this controversy in that the rights of the plaintiffs were strengthened and enlarged by the terms of the Act",

nevertheless states no valid reason why the description of the test ought not to be taken literally in this case. And in seeking an answer as to why it ought not to gauge for limitations purposes the action in the instant case by the test thus approved by the state court in the *Mattare* case, the court below admits "the answer is not so easy" (79). Then, continuing, it lays down in the following language *its own construction* of the meaning and effect of the Maryland statutes of limitations and the decisions of the Court of Appeals of Maryland construing them (79):

> "* * * the Maryland decisions show (that) actions may be regarded as based on contract and therefore barred after the expiration of three years even if they are affected by *or even though they owe their existence to legislative enactments.*" (Italics supplied.)

Under that interpretation the language of §3 is altered and the term "specialty" therein is amended or altogether

deleted, and necessarily the *Mattare* case and the whole line of Maryland decisions, before and after it, are summarily overruled. Even though an action may owe its entire existence to statute, it is nevertheless an action on simple contract barred after 3 years; hence, so far as statutory liability in Maryland is concerned, there is no longer any kind, class or type of action that may now, under the interpretation affixed by the court below to the Maryland limitations statutes, be considered as one upon a specialty. By the sweeping construction of the court below, even where, as here, both the liability and the remedy for its enforcement are created exclusively by statute, § 3 of Article 57 is not applicable to prescribe limitations.

Although the court below professes to base its interpretation of the Maryland statutes and decisions upon expressions in cases following the *Mattare* case, which the court below sees as inferentially overruled, nevertheless the opinion does not cite any decision overruling the *Mattare* case much less holding that an action which owes its existence to legislative enactments may be regarded as based on simple contract. In discussing the meaning and effect of the statutes as construed in the cases it cites, the court below in one part of its opinion makes the notable concession that "the question is not free from difficulty" (76). Under the well established rule that if there is substantial doubt as to which of two periods of limitations applies to an action *the longer period must be applied,* that concession, in itself, required the court below to apply the longer period prescribed by § 3. *Crawford County Tr. & Sav. Bank v. Crawford County,* 66 F. 2d 971 (cert. den., 291 U. S. 664); *Payne v. Ostrus,* 50 F. 2d 1039, 1042; *Hughes v. Reed,* 46 F. 2d 435, 440.

The first of the Maryland decisions quoted by the court below to sustain its conclusion that the *Mattare* case is no longer the law of Maryland is *Insurance Commissioner v. Wachter,* 179 Md. 608, where the Court of Appeals of Maryland expressly held that the statute, which the plaintiff there relied upon as having created the liability he sought to recover, did not create the liability but merely authorized that an existing liability under insurance policies be *restricted.* The Maryland court there said (p. 624-625):

> "* * * that the statute was passed, *not, as we construe it, to create a new liability,* but to provide that an *existing* liability should be expressed in the contract * * *. This, the court takes to intend an authorization of a *restriction* rather than a creation of an obligation. And from this construction it follows that for the simple contractual obligation the limitation is three years from September 12th, 1938, Code, Art. 57, sec. 1."

That holding is perfectly consistent with the Maryland rule as petitioners contend it to be. The federal Act here was undeniably passed to create a new liability, theretofore non-existent, of the employer for minimum wages, overtime compensation, liquidated damages and attorneys' fees, and to provide the remedy for their recovery. It wholly creates the obligation whose recovery this action sought. This action was not to recover a basic wage provided for by contract, but to recover reparations over and beyond the stipulated wage. Indeed, at the time most of petitioners entered respondent's employ the Act had not even been passed.

The opinion below attaches great significance to the holding in *Baltimore vs. Household Finance Corp.,* 168 Md. 13, as overruling the contention of a plaintiff, made under the authority of the *Mattare* case, that an action to recover

taxes paid under mistake of law was upon a specialty. Here again, however, under the view taken and expressed in its opinion by the Maryland court, the action did not meet the test of specialty because the statute merely made enforceable an existing implied promise to repay the taxes. In a suit under the Act, it creates the obligation and provides the exclusive remedy for its enforcement as well. A cardinal point of distinction of the situation in the tax case is that it involved a pre-existing moral obligation on the part of the City to refund taxes paid under mistake of law. The statute there did not create that obligation, which already existed without any relation to the statute, but merely converted the implied and existing moral and equitable obligation into a legal one. The universally accepted rule is that very little is required to impose a legal upon a moral obligation. *cf., Ingersoll v. Martin,* 58 Md. 67, 75-76.

That the force and validity of the rule as expressed and approved in the *Mattare* case are in nowise affected by the holding in the tax case, or by the element of contract involved in the case at bar, are conclusively demonstrated in the later case of *Sterling vs. Reecher,* 176 Md. 567, whose principles are reaffirmed in *Segafoose vs. Hospelhorn,* 179 Md. 325, 332. The *Sterling* case, moreover, conclusively establishes that the court below is entirely in error in construing the Maryland statutes to classify actions for limitations purposes according to "reliability and durability of evidence," because in the *Sterling* case, as in most actions for the recovery of stockholders' liability, there were involved complex matters of evidence against the preservation of which "the fullness of time weighs heavily" (77-78), concerning proof of liabilities, periods of stockholding, whether a stockholder was so in fact, and when

particular liabilities accrued. Those considerations did not, however, deter the Court of Appeals of Maryland from holding that §3 of Article 57 governed the matter of limitations. The Court of Appeals of Maryland, in holding, moreover, in the *Sterling* case, that despite the element of contract present the obligation to pay stockholders' liability and the remedy to enforce it were statutory so as to bring into operation the specialty rule in Maryland, restated the background of basic rule in Maryland as follows (pp. 569-570):

> "Since shortly after the enactment of the English statute of limitations on actions, 21 James 1, chapter 16, suits grounded on statutes have been held to be in debt on records of the highest rank, those of acts of Parliament, and hence specialties. *Bacon, Abridgement, Limitation of Action* (D). 'All instruments under seal, of record, and liabilities imposed by statute are specialties'. 1 *Wood, Limitation of Actions* (4th Ed.), sec. 29; *Angell, Limitations of Actions* (6th Ed.), sec. 80. And suits upon them are not within the original act providing the limitation on actions on simple contracts. 'An action grounded upon a statute cannot be barred; such as debt for an escape,'—an action for which was provided by a statute of 1 Richard II, ch. 12. *Ward v. Reeder,* 2 H. & McH. 145, 154; *French v. O'Neal,* 2 H. & McH. 401; *Newcomer v. Keedy,* 2 Md. 19. But the element of contract in a subscription to stock, upon which the statute of Maryland lays the double liability, has produced uncertainty in the classification of suits to recover it. Are they grounded on contract or on the statute? 1 *Wood, Limitation of Actions,* sec. 19. 'The liability is wholly statutory, and its definition must be found in the words of the statute creating it.' *Robinson v. Hospelhorn,* 169 Md. 117, 131. But the question now is one of the remedy rather than of the origin or nature of the liability.

> "It has been held generally that when the statute creating a liability provides the remedy and allows no other, then the remedy could be only that provided, and it would be grounded on the statute, necessarily, but that a common law action of debt might lie either when such an action is given by the statute or when the statute provides for the payment of a sum of money but does not mention any mode of recovering it. *Browne, Actions at Law* (45 Law. Lib.), 347; *Comyns, Dig. 'Actions upon Statute'* (C), and 'Temps' (G 15); 1 *Wood, Limitation of Actions*, sec. 29. And see *Mattare v. Cunningham*, 148 Md. 309. * * * What a statute has provided is a question of its intention, ascertained from express terms or by implication."

The essential ground of the decision below, that "the obligations sued on in the present case are contractual in their nature", and hence the action is one upon contract rather than statute, entirely misconceives both the scope and nature of an action under the Act and the meaning and effect of the Maryland limitations statutes as construed by the Maryland courts.

As in *Sterling vs. Reecher, supra,* where the Maryland court noted that "the element of contract in a subscription to stock, upon which the statute of Maryland lays the double liability, has produced uncertainty in the classification of suits to recover it," petitioners' claims here undoubtedly had their ultimate origin in a contractual or *quasi-contractual* relation between them and respondent fixing the terms of employment and compensation therefor. To the extent that those terms and that compensation collided with the federal Act, however, they are illegal, null and void, and have been in this case adjudicated to have constituted a violation of the Act. But the contract of employ-

ment had nothing to do with overtime or what constituted it, or with overtime compensation or the consequences upon respondent for failure to pay it.

"The Federal statute invaded the area of the contract relation and decreed that working beyond the statutory period prescribed constituted working not under the contract but entirely outside of the contract terms and upon the terms and conditions super-added by the statute. * * * Except as to the base rate of compensation determined by the contract or quasi-contract the (federal) statute does not depend upon or have any relation to the contract or its terms but on the contrary overrides them and adds substantially different terms of its own", Frank, J., in the *Manhoff* case.

That the element of contract which necessarily is involved does not make the action for the enforcement of the liabilities created by the Act any less a statutory one has been authoritatively determined. In *McClaine v. Rankin*, 197 U. S. 154 (which distinguishes *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, so heavily relied upon by the court below), Mr. Chief Justice Fuller, speaking for the Court, asked: "Conceding that a statutory liability may be contractual in its nature, or more accurately, quasi-contractual, does it follow that an action given by the statute should be regarded as brought on simple contract * * *?" In answering in the negative, he said:

> "It is true that in particular cases the liability has been held to be, in its nature, contractual, yet, it is nevertheless conditional, and enforceable only according to the Federal statute, independent of which the cause of action does not exist; so that the remedy at law in effect given by that statute is subject to the limitations imposed by the state statute on such actions."

Neither of the authorities construing laws of other jurisdictions, resorted to and relied upon by the court below, supports its findings. *Northwestern Yeast Co. v. Broutin,* 133 F. 2d 638, decided only that a claim for overtime compensation is "a debt or demand, arising upon contract, judgment or decree" as against the contention that, within the meaning of the Ohio attachment statutes, it was a "penalty." *Loggins v. Steel Construction Co.,* 129 F. 2d 118, construing the prescription statutes of Louisiana, holds that an action for overtime compensation is one for wages or, in the alternative, for the violation of a statutory duty, as against the contention that it was a suit on quasi-contract with a longer period of limitations.

Although the court below holds that its position is strengthened by the English decision in *Gutsell vs. Reeve,* 52 T.L.R. 55, petitioners submit that the ruling in that case, which involved The Agricultural Wages (Regulation) Act, 1924 (1 *Halsbury's Stats. of Eng.,* 127), a penal statute, has none but the remotest application to an action brought under the vastly more comprehensive provisions of the Fair Labor Standards Act for many reasons, particularly because under the British Act the employee's claim for minimum wages was completely barred and hence both his claim and right of recovery necessarily had to rest solely upon his contract of employment. §7(9) of the British Act, recognizing that obvious defect there, provides that the powers given for recovery of sums due from an employer to a worker "shall not be in derogation of any right of the worker to recover such sums by civil proceedings", and that and other provisions of that Act establish that it clearly *restricts* an employee's rights to recover by virtue of that Act itself any unpaid wages. Totally unlike the federal Act here, the British Act gives an employee

no right whatever to sue for his minimum wage, much less a right to recover overtime compensation and liquidated damages. In discussing §7(9) of the British Act, the Master of the Rolls said in *Gutsell vs. Reeve:*

> "That clearly means that the special remedies under subsections (3) and (4) *are not to be exclusive* and are not to bar the worker from proceeding, if he is so minded, *by ordinary civil proceedings.* It leaves him free to recover by civil proceedings any amount (as he is seeking to do here) to which he is lawfully entitled in accordance with the Act." (Italics supplied.)

It is to be importantly noted that the situation presented in that case constituted an express exception to the rule recognized by the Maryland court in the *Mattare* case, 148 Md. 309, at page 315, in the following language:

> "If the statute imposes an obligation, and gives a special remedy therefor, which otherwise could not be pursued, but at the same time a remedy for the same matter exists at common law independently of the statute, and the statute does not take away the common law remedy, the bar of the statute is effectual when the common law remedy for the breach of the common law duty or liability is pursued."

As the opinion of the court below acknowledged, petitioners cited to it, in distinguishing *Gutsell vs. Reeve*, an English decision construing the Truck Acts (1 and 2 Will. IV., c. 37): *Pratt vs. Cook, Son & Co.*, 56 T.L.R. 363 (reported below: (1938) 2 K.B. 51, 70-71; and in the Court of Appeal, (1939) 1 K.B. 364, 379, 387). There the House of Lords reversed the Court of Appeal and restored the original judgment on grounds not involved here, but reference to each of the three decisions reveals that each of the respective courts agreed that the action there under

the Truck Acts, much more closely resembling the Fair Labor Standards Act than does the statute construed in *Gutsell vs. Reeve*, was an action upon specialty within the meaning of §3 of the Civil Procedure Act, 1833, from which is derived §3 of Article 57. In the opinions in the House of Lords in the *Pratt* case it is said (p. 365):

> "No such cause of action exists apart from the statute and it follows that the period of limitation must be as decided."

And Wrottesley, J., in the lower court (1938) 2 K.B. 51, at page 71, said:

> "This is not, therefore, a case where the Act merely enables the plaintiff to sue on a contract or a cause of action dehors the statute. The distinction is well illustrated in the case of *Gutsell vs. Reeve* (1936), 1 K.B. 272, where Lord Wright, after a careful examination of the case of *Cork and Bandon Rwy. Co. vs. Goode*, 13 C.B. 826, distinguishes that case from the facts then under discussion * * *."

It is especially to be noted that *Cork and Bandon Rwy. Co. vs. Goode*, 13 C.B. 826, also referred to by the court below, is cited and followed by Chief Judge Bond of the Court of Appeals of Maryland in *Sterling vs. Reecher, supra*, 176 Md. 567, 571. In *Cork and Bandon Rwy. Co. vs. Goode*, Mr. Justice Maule said:

> "* * * Now a declaration in debt upon a statute is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability are facts *dehors* the statute. That must constantly arise in actions for liabilities arising out of statutes. That appearing to be so, the allegation in the plea, that the action is upon contracts without specialty, is a false allegation as a matter of law."

Petitioners submit that summation to be equally applicable to the case at hand, and that that case, and the *Pratt* case establish beyond question that the Maryland rule as contended for by petitioners is in accord with the British decisions construing their statutes from which the Maryland statutes of limitations are derived.

The only ground of distinction of the *Pratt* case noted by the court below is that "the contract of employment upon which the defendant relied was declared by the court to be illegal, null and void under the statute, and as a consequence, there was present no element of contract to support the contention that the shorter period of limitations applied" (83). However, the same is likewise true of the contract of employment in the case at bar. The wage plan here has been adjudicated to have been violative of the provisions of §7 of the Act. As said by Mr. Justice Murphy, speaking for the Court in *Walling vs. Helmerich & Payne*, 323 U. S. 37, 40: "No plan so obviously inconsistent with the statutory purpose can lay a claim to legality."

It is, finally, of great interest to note that in practically every other jurisdiction where the question has been determined it was held that suits under the Fair Labor Standards Act are controlled by state statutes of limitations applicable to actions upon liabilities created by statute. *Walsh v. 515 Madison Avenue Corp.*, 181 Misc. 219, 42 N. Y. S. 2d 262, affmd., 267 App. Div. 756, 45 N. Y. S. 2d 927, app. gr., 267 App. Div. 819, 47 N. Y. S. 2d 109, affmd., 293 N. Y. 826, 59 N. E. 2d 183; *Asselta v. 149 Madison Avenue Corp.*, 65 F. Supp. 385, 387 (affmd., 156 F. 2d 139; *149 Madison Avenue Corp. v. Asselta*, 67 S. Ct. 1178); *Gonzales v. Tuttman*, 59 F. Supp. 858, 861; *Cannon v. Miller*, 22 Wash. 2d 227, 155 P. 2d 500; *Fullerton v. Lamm*, 177 Ore. 655, 163 P. 2d 941 (rehearing den., 165 P. 2d 63); *City of Phoenix v.*

Drinkwater, 46 Ariz. 470, 52 P. 2d 1175; *Lorenzetti v. American Trust Co.*, 45 F. Supp. 128, 139-140 (rev. on other grds., 137 F. 2d 742); *Abram v. San Joaquin Cotton Oil Co.*, 46 F. Supp. 969, 975-976.

CONCLUSION.

It is, therefore, submitted that this case is one calling for the exercise by this Court of its powers of review, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the court below and, in the respects in which petitioners complain thereof, finally reverse it.

Respectfully submitted,

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Baltimore, Maryland,
September 10, 1947.

APPENDIX TO APPELLEES' BRIEF.

BALTIMORE CITY COURT

(Filed March 15th, 1942)

AUGUST MANHOFF, JR.,

vs.

THOMSEN-ELLIS-HUTTON COMPANY.

FRANK, J.:

This action was brought to recover unpaid overtime compensation and an additional equal amount as liquidated damages pursuant to the provisions of the Fair Labor Standards Act of June 25, 1938, 52 Stat. at Large 1060, 1063, Chapter 676, 29 U. S. C. A. Sec. 207. This Federal statute is generally referred to as the "Wage and Hour Law." It is conceded that jurisdiction is bestowed upon this Court as a court of competent jurisdiction by sec. 16 (b) of the Act. Sec. 7(a) provides that no employer (with exceptions not relevant here) shall employ any of his employees in the production of goods for any interstate purpose for a work week longer than 44 hours during the first year of the operation of the law, than 42 hours during the second year thereof, than 40 hours thereafter, unless the employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. By sec. 16 (b) the employer violating the above requirement is made "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their overtime compensation, as the case may be, and in an additional equal amount, as liquidated damages." * * * "The Court shall, in addition to the judgment awarded to the plaintiff * * * allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The declaration in this case makes no claim for unpaid minimum wages, but only for unpaid overtime compensation and liquidated damages in an equal amount.

To this declaration the defendant filed four pleas, the first and second being the general issue pleas in assumpsit; the third plea sets up the defense of limitations as against plaintiff's entire claim. The fourth plea sets up the same defense as to "most items embraced" in plaintiff's claim. In each plea the limitation period is fixed at 3 years under section 1 of Article 57 of the Annotated Code.

The plaintiff demurred to each of the 3rd and 4th pleas. The demurrers do not comply with the requirements of Rule 15-A of the Supreme Bench of Baltimore City. As defendant expressly waived the right to object to the demurrers on this ground, no consideration need be given to this failure.

The sole ground of the demurrers urged at the hearing was that the cause of action alleged in the declaration was a specialty and that the period of limitations appropriate thereto is 12 years (and not 3 years) as prescribed by section 3 of Article 57 as follows:

> "no bill, testamentary, administration or other bond * * * judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever * * * shall be good and pleadable or admitted in evidence against any person in this State after the principal debtor and creditor have been both dead for twelve years, or the debt or thing in action is above twelve years' standing" * * *

By the provisions of section 3 of Article 75 of the Code, the form of action here is assumpsit, but the period of limitations prescribed by law at the time of the enactment of that section still governs. If, therefore, the cause of action here is upon a specialty the twelve years' limitation will apply; if, however, it is upon a simple contract the three years' period, as set up in the third and fourth pleas, will control.

The Fair Labor Standards Act is constitutional. U. S. vs. Darby (1941), 312 U. S. 100, 85 L. Ed. 609, 132 A. L. R. 1430; Overnight Motor Transportation Co. vs. Missel (1942), 316 U. S. 572, 575, 86 L. Ed. 1682, 1690. The allowance of liquidated damages for failure to comply with its terms is not a penalty or punishment. "The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." The provision is constitutional. Overnight Motor Transportation Co. vs. Missel, supra, 316 U. S. at p. 583, 86 L. Ed. at p. 1690.

The Federal statute contains no period of limitations and in the absence of other applicable limitations, the claim would be subject to no bar. Lorenzetti vs. American Trust Co. (N. D. Cal. 1942), 45 Fed. Supp. 128; Klotz vs. Ippolito (S. D. Tex. 1941), 40 Fed. Supp. 422, 426. Under such circumstances, the general rule applies that the defense of limitations relates to a matter of procedure and is governed by the *lex fori*. The parties hereto agree that the Statutes of Limitations in force in Maryland here control. Mandru vs. Ashby (1908), 108 Md. 693, 695; Ins. Comm. vs. Wachter (1941), 179 Md. 608, 624; Klotz vs. Ippolito, supra, p. 426.

The question as hereinbefore stated is thus whether under the Maryland statute of limitations the claim here in suit is upon a simple contract subject to the three-year period of limitations (Section 1, Article 57), or upon a specialty governed by the twelve-year period of limitations (Section 3).

The claim herein at issue undoubtedly had its ultimate origin in a contractual or quasi contractual relation between the defendant employer and the plaintiff employee that fixed the terms of employment and the compensation to be paid and received thereunder. No question as to any of these matters is involved herein. Lorenzetti vs. American Trust Co. (N. D. Cal. 1942), 45 Fed. Supp. 128, 139. This relation had nothing to do with overtime, as to what constituted overtime and what should be the compensation

for such overtime and what should be the consequences of the failure to pay such compensation. That is to say, the Federal statute invaded the area of the contract relation and decreed that working beyond the statutory period prescribed constituted working not under the contract but entirely outside of the contract terms and upon the terms and conditions super-added by the statute. The employee under the contract may as alleged have been working sixty-four hours a week at the stipulated compensation. The statute says all the time in which the employee works beyond successively 44, 42 and 40 hours is overtime and must be compensated for as overtime in accordance with the statute, even if in conflict with the contract, and as a sanction imposes the payment of liquidated damages equal to the amount of the overtime payment. Except as to the base rate of compensation determined by the contract or quasi contract the statute does not depend upon or have any relation to the contract or its terms but on the contrary overrides them and adds substantially different terms of its own.

Without reviewing the earlier Maryland cases cited in Mattare vs. Cunningham (1925), 148 Md. 309,* that case involved an action brought in this Court upon a monetary award of the State Industrial Accident Commission affirmed by this Court on appeal. The action was brought more than three years after the last payment became due under the award. It is apparent that the situation grew out of a contract relation, the employment of plaintiff by the defendant which among other things fixed the compensation upon which the amount of the award was based under the Workmen's Compensation Act. The Court said (p. 316): "The proceeding before the commission was created by statute, had its foundation therein, and had for its purpose the compelling of payment by the employer to an injured employee, or his dependents, where the injury or death was accidental and arose out of, and in the course of, his employment, a sum of money as compensa-

* Cf. Baltimore vs. Webb (Dickerson, J.) The Daily Record, November 15, 1939, affirmed on appeal in Webb, Admr. vs. Baltimore (1941), 179 Md. 407; Baltimore vs. Main (Sup. Ct., Smith, J.), The Daily Record, March 4, 1943.

tion for the injury or death. The suit upon the award, which is the approved and proper method of enforcing the award of the commission, is simply compelling *the full and complete performance by the employer of the obligation imposed by the statute.* We think that reason and authority are conclusive upon the point, that the award of the State Industrial Accident Commission is a specialty within the meaning of Section 3 of Article 57 of the Code, and that an action or suit based upon the award is not barred by limitation if the suit thereon is instituted within twelve years from the date of the award." (Italics supplied).

The next case chronologically is Sterling vs. Reecher (1939), 176 Md. 567. This grew out of an action brought by the receiver of the Central Trust Company of Maryland against stockholders to recover their double liability under Section 72 of Article 10 of the Code, which had been in force prior to 1937. Said Chief Judge Bond on page 569: * * * "suits grounded on statute have been held to be in debt on records of the highest rank, those of acts of Parliament, and hence specialties * * * 'all instruments under seal, of record, and liabilities imposed by statutes are specialties' * * * And suits upon them are not within the original act providing the limitations in actions on simple contracts * * * But the element of contract in a subscription to stock, upon which the Maryland statute lays the double liability, has produced uncertainty in the classification of suits to recover it. Are they grounded on contract or on the statute? * * * "The liability is wholly statutory, and its definition must be found in the words of the statute creating it.' Robinson vs. Hospelhorn, 169 Md. 117, 131." The opinion continues on page 571: "They seem to the Court to leave no doubt that the remedy for the liability is now purely statutory, and the only right of action that on a specialty. * * * The limitation of twelve years under Section 3 of Article 57 is found to apply for the reasons stated." Here again there was, as the opinion points out, the element of the contract upon which the stockholders' double liability was grounded, i. e., the contract of subscrip-

tion to the bank's stock. Yet it was the statute that created the double liability and the procedure to enforce it. Consequently, the cause of action was the creature of the statute and, therefore, a specialty with its period of limitations twelve years as prescribed by Section 3 of Article 57.

The latest Maryland case and that most relied on by the defendant is Ins. Commissioner vs. Wachter (1941), 179 Md. 608. This was an action brought by the Insurance Commissioner of Pennsylvania, as the statutory liquidator of a dissolved reciprocal or inter-insurance exchange of that Commonwealth, against a Maryland subscriber to this exchange and member of it. The purpose of the suit was to collect from the defendant an assessment levied under the order of a Pennsylvania Court. This assessment was levied on September 12, 1938. Suit was brought within three years from that date, so that "the question of limitations does not arise." The Court, however, considered and decided that question "because of the great number of possible suits in which it may arise." (p. 626). The Court said (p. 624): "This Court has observed the distinction between limitations in suits on simple contract obligations and those in suits on statutory liabilities. Sterling vs. Reecher, 176 Md. 567. It is sometimes a narrow one when the liability sued on is imposed by both a contract and a statute, *but the stipulation here seems to remove all difficulty.* The original purpose of the enterprise included a liability to contribute to pay losses, and as the policies did not restrict the losses payable to any limit on assessments *it might be questioned whether the contract limit was consistent with that general purpose.* Supreme Lodge, K. P. vs. Mims, 241 U. S. 574. * * * The Attorney General of Pennsylvania declared that such a restriction of assessment was unlawful, and the Insurance Commissioner of the State extended the time for complying to March 13, 1929. It was in the situation thus arising that the statute was passed, not, as we construe it, to create a new liability, but to provide that an existing liability should be expressed in the contract but might be fixed at

or above a specified minimum, equal to the amount of the original premiums. *This, the Court takes to intend an authorization of a restriction, rather than a creation of an obligation,* and from this construction it follows that for the simple contractual obligation, the limitation is three years from September 12th, 1938. Code, Art. 57, Sec. 1." (Italics supplied).

The result of these three Maryland decisions seems plainly to be that, where the relationship created by contract is restricted by the statute, the obligation remains a simple contractual one subject to the three years period of limitations. Wherever, however, the contractual relationship has imposed upon it by the statute obligations additional to and different from those created by the contract, rights arising out of those superadded statutory obligations constitute specialties a breach whereof gives rise to a right of action which will be barred only by the lapse of twelve years. Code, Article 57, Section 3.

The claim in the present action, arising under the Fair Labor Standards Act, is unquestionably in addition to all such as might arise under the original contract of employment between the parties. The Act does not restrict but greatly extends the obligations of the defendant to the plaintiff. Accordingly, defendant's breach of those statutory obligations gives rise to a cause of action as to which the twelve year period of limitations applies.

The cases involving statutes of Texas and Louisiana cited and relied on by defendant are not persuasive, because the statutes involved are wholly different from the controlling Maryland statute. In any event they cannot prevail in the face of what I have found to be the clear import and effect of our own decisions.

The demurrers to the 3rd and 4th pleas of limitations will be sustained. They are, of course, not amendable.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 340.

ROY E. BLACK, G. HERBERT FEIK, EDGAR M. FLEWELLYN, ROBERT E. KEMP, EVERETT D. MILBURN, SR., WILLIAM K. STROBEL and ELMER V. YOUNG, *Petitioners*,

v.

THE ROLAND ELECTRICAL COMPANY, A corporation, *Respondent*.

On Petition for Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Maryland is reported as *Roy E. Black, et al.* v. *Roland Electrical Company*, 68 Fed. Supp. 117. The opinion rendered August 12, 1947, in the case by the United States Circuit Court of Appeals for the Fourth Circuit as *Roland Electrical Company* v. *Black et al.*, is in the record (R. 69, 84) but had not been printed in the reports at the time this brief was prepared.

STATEMENT OF THE CASE.

This suit was instituted March 13, 1945, by the petitioners, seven of the employees of the Roland Electrical Company, and was pending on January 28, 1946, when this Court filed its opinion in *Roland Electrical Company* v. *Walling*, 326 U. S. 657, 678, affirming the holding of the court below that the employees of this respondent were engaged in the production of goods for commerce within the terms of the Fair Labor Standards Act, hereinafter referred to as FLSA.

The suit in the District Court of these petitioners was held in abeyance from March 13, 1945, until shortly after January 28, 1946, when it came on for trial. By answer filed the respondent interposed three separate and distinct defenses to claims of the petitioners set forth in their joint complaint. (R. 10, 14.)

One defense was that any and all parts of their respective claims which accrued more than three years prior to the filing of the suit on March 13, 1945, were barred by the three-year Maryland Statute of Limitations.

Another defense was that the aggregate of the sums paid by the respondent to the respective petitioners, during the period in which their claims were not barred, as wages and as year-end bonuses[1], exceeded the amounts claimed by them under the terms of FLSA.

The third defense was that the respondent had paid to the respective defendants overtime in certain weeks for work before regular working hours or after regular working hours or for Saturday afternoons, when such defendants did not work an aggregate of 40 hours during such

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[1] The year-end bonuses were paid in the sole discretion of the management of the electrical company, without any prior agreement, and were computed on 5% of the aggregate wages received by the respective employees for the preceding 11 months of the calendar year, less deductions from the bonuses for Social Security and Withholding taxes of the employee. (R. 15, 16)

weeks[2], and that the respondent was entitled to credit for any overpayments, measured by FLSA standards in any week against short or under-payments in any subsequent week.

The petitioners presented at the trial no records as to the time each claimed to have worked or as to the amount claimed. The records of the respondent were accepted and used without question as to their correctness with respect to the time worked and the payments made. Stipulations were entered into between counsel as to the amounts due, computed in accordance with FLSA, in event decision was adverse to the respondent and as the court below remarked, "The plaintiffs expressly waive any claim to a greater sum." (R. 73.)

The District Court, whose prior decision had been reversed that the employees of respondent were not within the terms of FLSA, ruled against the respondent on all three defenses raised in the answer to the complaint, though it did not see fit to notice in its opinion the matter of the Statute of Limitations. The Circuit Court of Appeals affirmed the District Court in denying the credits claimed by the respondent for the bonuses and over-payments, but reversed the District Court as to its holding that all parts of the claims which accrued more than three years prior to the filing of the suit were barred by the three year Maryland Statute of Limitations.

This petition has been filed by the seven employees for a writ of certiorari to the United States Circuit Court of

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[2] As this Court noted in *Roland Electrical Company* v. *Walling*, 326 U. S. 657, 678, a part of the service rendered by the electrical company to some of its customers consisted in repairing of electrical appliances, etc., in the shops, etc., of such customers. These services were rendered when requested, either day or night. If an employee had to render such services either before or after the regular working hours, the electrical company followed the practice of paying such employee time and one-half for all such hours worked before or after regular working hours regardless of whether such employee worked 40 hours in any week in which such payments were made. (R. 17, 18)

Appeals for the Fourth Circuit to review the opinion and judgment holding that the three year, and not the 12 year Maryland Statute of Limitations applies in this case.

STATUTES INVOLVED.

Article 57, Section 1, Code of Public General Laws of Maryland (Flack's Ed. 1939):

> "All actions of account, actions of assumpsit, or on the case, except as hereinafter provided, actions of debt on simple contract, detinue or replevin, all actions of trespass for injuries to real or personal property, all actions for illegal arrest, false imprisonment, or violation of the twenty-third, twenty-sixth, thirty-first and thirty-second articles of the declaration of rights, or any of them, or of the existing, or any future provisions of the code touching the writ of habeas corpus, or proceedings thereunder, and all actions, whether of debt, ejectment or of any other description whatsoever, brought to recover rent in arrear, reserved under any form of lease, whether for ninety-nine years renewable forever, or for a greater or lesser period, and all distraints issued to recover such rent shall be commenced, sued or issued within three years from the time the cause of action accrued; and all actions on the case for libel and slander and all actions of assault, battery and wounding, or any of them, within one year from the time the cause of action accrued; this section not to apply to such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants who are not residents within this State."

Article 57, Section 3, Code of Public General Laws of Maryland (Flack's Ed. 1939):

> "No bill, testamentary, administration or other bond (except sheriffs and constables' bonds), judgment, recognizance, statute merchant, or of the staple or other specialty whatsoever, except such as shall be taken for the use of the State, shall be good and pleadable, or admitted in evidence against any person in this State after the principal debtor and creditor have been both

dead twelve years, or the debt or thing in action is above twelve years' standing; provided, however, that every payment of interest upon any single bill or other specialty shall suspend the operation of this section as to such bill or specialty for three years after the date of such payment; saving to all persons who shall be under the aforementioned impediments of infancy or insanity of mind the full benefit of all such bills, bonds, judgments, recognizances, statute merchant, or of the staple or other specialties, for the period of six years after the removal of such disability."

POINTS RELIED UPON.

I.

There is neither equity nor a matter of public importance involved in this case.

II.

The United States Circuit Court of Appeals for the Fourth Circuit properly disregarded the nisi prius court decision in the Manhoff case.

III.

The Portal-To-Portal Act of 1947 (Public Law 49, 80th Congress) has established the rule for all cases arising thereafter.

ARGUMENT.

I.

There is neither equity nor a matter of public importance involved in this case.

There is not here any question of substandard wages having been paid by the respondent to the petitioners. As shown by the record in the case, the respondent at all times paid basic rates of wages considerably in excess of the FLSA minimum rates of wages.

The issue here arises solely because of overtime for work in excess of the FLSA standard of 40 hours a week whilst the respondent, because of the nature of its service establishment, had a workweek of 44 hours—eight hours from Monday to Friday, inclusive, and 4 hours on Saturday.

As shown by the stipulated computations in the record, the respondent paid to each and every one of the petitioners more money in the aggregate than such employees are entitled to receive under the terms of FLSA, that is, with the unquestionable basic straight time rate paid in excess of the minimum FLSA rates for straight time of 40 hours a week and with such basic rate plus one-half thereof for all hours worked in excess of 40 hours a week.

No equity arises in such a case simply because the year-end bonuses and the overtime paid when none was in fact earned were not set apart and tagged as being for overtime compensation under the FLSA. Respondent firmly believed, and continued to believe until this Court held to the contrary, that its employees were not engaged in the production of goods for commerce, and thus were not under the FLSA. Yet respondent was more liberal in making payments to its employees than it would have been had the payments been made in exact compliance with the FLSA.

Also, the petitioners do not show any conflict between the court below and any other United States Circuit Court of Appeals, or with this Court as to the merits of the claims of petitioners. So far as counsel for the respondent know, there are no such conflicts.

There is thus no matter of public importance involved which would justify this Court in allowing the writ and reviewing the correctness of the action taken by the court below.

II.

The United States Circuit Court of Appeals for the Fourth Circuit properly disregarded the nisi prius court decision in the Manhoff case.

The Manhoff case was one in which there was involved in the Baltimore City Court a question under FLSA whether the three year or the 12 year Statute of Limitations of the State of Maryland applied. Judge Frank of that court held that the 12 year Maryland Statute of Limitations applied. Judge Soper, who wrote the unanimous opinion of the Circuit Court of Appeals in this case, was formerly a member of the Supreme Bench of Baltimore City and a Judge of the Baltimore City Court. He stated in the opinion with respect to the Manhoff case that:

> "A decision directly applicable, contrary to the one we have reached, was rendered in *Manhoff* v. *Thomsen-Ellis-Hutton Co.*, 6 Labor Cases, 61,498, by Judge Eli Frank, an able and experienced member of the Supreme Bench of [fol. 80] Baltimore City, a court of *nisi prius* jurisdiction; but after careful consideration, we have reached the conclusion that it is not in accord with the rules announced in related cases by the Court of Appeals of Maryland, in the highest court of the state. Judge Frank's decision, while entitled to great respect, would not be binding on other trial courts of the state and under the rulings of the Supreme Court is not binding upon us. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *West* v. *A. T. & T. Co.*, 311 U. S. 223; *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180; *The Order of Commercial Travelers of America* v. *King*, 4 Cir. 161 F. 2d 108." (R. 77.)

The policy announced in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, was applied in each of the cases cited in the above quoted extract from the opinion below. In all of those cases, the State courts involved appear to have been intermediate appellate courts and there were no convincing reasons supporting any substantial belief that the highest

courts of the respective states would have decided the particular questions of State law any differently than the respective intermediate courts had decided them.

The Manhoff case was decided by an "inferior court," a *nisi prius* court, whose opinions are not binding on any other court in the State of Maryland. Not being binding in Maryland, it would seem obvious that they should not be considered binding on the Federal courts.

Counsel for the petitioners has argued (p. 31) that the court below adopted its own "Rule of decision" but we believe that the opinion of the court below very clearly shows that said court did not attempt to determine for itself the question of the interpretation and effect of the Statutes of Limitations of Maryland. On the contrary, the court below examined all of the evidence as to the Maryland law on limitations. It made a searching and exhaustive examination of the statutes involved, as well as the applicable decided cases in the highest court of that State.

The issue in the Manhoff case in the Baltimore City Court and in the court below is quite simple, namely, whether the 3 year Statute of Limitations contained in the hereinbefore quoted Article 57, Section 1 of the Code of Public General Laws of Maryland, or whether the 12 year Statute of Limitations, applicable to specialties, contained in Section 3 of the same Article applies to a suit for additional wages under the FLSA. Admittedly, that precise question has not been determined by the highest court of Maryland. There are no intermediate appellate courts in that State.

The Baltimore City Court concluded in the Manhoff case that the 12 year Statute of Limitations applied, while the court below disagreed therewith and concluded that the 3 year Statute of Limitations applied for reasons which are fully, and we believe correctly, stated in the opinion.

We think it obvious that whatever right, in law or equity, which the petitioners have to recover from the respondent additional compensation, is not based on a specialty but is

based on the facts applied to the standard stated in the law. The right in no sense partakes of the certainty of a specialty. This is made self-evident by the bitterly contested case of *Roland Electrical Company* v. *Walling, supra,* decided by this Court, and by the contest in the District Court and in the court below in this particular case. This results because the terms of the agreement of employment, the character of work performed, the straight time rates of wages, the number of hours each petitioner worked each week, the amounts of compensation paid each employee weekly, etc., are all questions of fact to be established, as facts are established in any law suit not based on a specialty.

III.

The Portal-To-Portal Act of 1947 amending the Fair Labor Standards Act and prescribing not to exceed a 2 year period of limitations for all causes of action accruing after the approval of the said Portal-To-Portal Act not only renders the contentions of the petitioners relatively unimportant but establishes the incongruity of such contentions.

Part IV, Section 6(a) of the Portal-to-Portal Act of 1947 prescribes limitations of not exceeding 2 years for all causes of action accruing after the date of enactment of said act. Section 6(b) provides that:

> "if the cause of action accrued prior to the date of the enactment of this act—[suit] may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every action shall be forever barred unless commenced within the shorter of such two periods;" (word in brackets supplied).

Section 6(c) provides, in effect, that if the cause of action accrued prior to the enactment of the Portal-to-Portal Act and was not then barred by an applicable State statute

of limitations, suit thereon should not be barred by Section 6(c), if commenced within 120 days after the enactment of said Portal-to-Portal Act.

This statute became law after the judgment was entered in the District Court but while the appeal was pending in the court below. A Statute of Limitations is jurisdictional and applies to all causes, whether or not pending in court on the date of the enactment thereof. See *Bell* v. *Morrison*, 1 Peters, 351; *Brent* v. *Bank of Washington*, 10 Peters, 596; *Burnet* v. *Desmornes*, 226 U. S. 145; *Vance* v. *Vance*, 108 U. S. 514, *Mitchel* v. *Clark*, 110 U. S. 663; *In re McClure*, 21 Fed. (2d) 538.

The court below stated in a footnote to its opinion that:

> "The limitation provisions of the Portal-to-Portal Act of 1947, Part 4, Sec. 6 are likewise inapplicable here, since they were limited to actions *commenced* on or after the date of the enactment of the statute." (R. 76) (Italics supplied).

But regardless of the correctness of the conclusion, in effect, of the court below that the Portal-to-Portal Act of 1947 made a distinction between causes of action pending in court under the Fair Labor Standards Act and causes of action which had accrued or might thereafter accrue and suit be commenced thereon, the fact remains that the Congress has seen fit to declare in a statute that suit must be commenced on such causes of action within whichever is the shorter of two periods, namely (1) two years, or (2) as permitted under applicable State statute of limitations, subject to the grace period in Section 6(c) of the Act.

The fact that this statute was enacted demonstrates that it was and is the belief of the Congress that the period of limitations for suits under FLSA should not exceed 2 years and could be less if the respective States should so provide. Also, the fact of this statute renders relatively unimportant the public interest in the issue raised by the petitioners that the applicable State of Maryland statute of limitations permits suits under FLSA within 12 years from the date

the cause of action accrued, rather than within 3 years, as held by the court below.

We think, too, that in the face of this statute, it is incongruous of the petitioners to submit a labored argument to this Court that it should now grant certiorari and reverse the court below because it did not apply the 12 year Maryland Statute of Limitations in this suit for recovery of additional wages.

CONCLUSION.

It is the position of the respondent that the petition for a writ of certiorari is without merit and should be denied.

Respectfully submitted,

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FILE COPY

No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1947

ROY E. BLACK, G. HERBERT FEIK, EDGAR M. FLEWELLYN, ROBERT E. KEMP, EVERETT D. MILBURN, SR., WILLIAM K. STROBEL and ELMER V. YOUNG,

Petitioners,

vs.

THE ROLAND ELECTRICAL COMPANY, a corporation,

Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF BETHLEHEM-FAIRFIELD SHIPYARD, INCORPORATED, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AND

BRIEF OF AMICUS CURIAE IN OPPOSITION.

WILLIAM L. MARBURY,
Counsel for Bethlehem-Fairfield Shipyard, Incorporated.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 340

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Bethlehem-Fairfield Shipyard, Incorporated, respectfully moves for leave to file the accompanying brief as *amicus curiae* for the following reasons:

1. The undersigned counsel for Bethlehem-Fairfield Shipyard, Incorporated, filed his petition for permission

to submit a brief and to be heard in oral argument as *amicus curiae* in the court below. This petition was granted and, after argument, the decision of the District Court was reversed on the single point argued by the undersigned counsel. It is this point which the petition for certiorari now seeks to have this Court review.

2. The petition filed below for leave to submit a brief and to be heard as *amicus curiae* is set forth in full in the record (R. 64-67). The allegations of that petition show that the decision in this case is of vital consequence to Bethlehem-Fairfield Shipyard, Incorporated, in connection with a suit now pending in the United States District Court for the District of Maryland. The decision below eliminated from that suit claims very large in amount, the defense of which would have imposed a very heavy burden on that company.

3. Counsel for both petitioner and respondent have filed with the Clerk of this Court their written consent to the granting of this motion.

WILLIAM L. MARBURY,
Counsel for Bethlehem-Fairfield Shipyard, Incorporated.

In the Supreme Court of the United States

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CITATIONS

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, which appears in the record, pages 69-84, has not yet been officially reported. The opinion of the District Court, included in the record, pages 51-62, is reported in 68 F. Supp. 117.

STATEMENT OF CASE.

The *amicus curiae* concurs in respondent's Statement of the Case.

ARGUMENT.

On March 15, 1942, Judge ELI FRANK, sitting at nisi prius in the Baltimore City Court, held that a suit to recover overtime compensation, liquidated damages, fees and penalties under the Fair Labor Standards Act of 1938, 29 U. S. C. §201 *et seq.*, was an action on a "specialty" within the meaning of Section 3 of Article 57 of the CODE OF PUBLIC GENERAL LAWS OF MARYLAND and, hence, barred only after the expiration of twelve years. *Manhoff v. Thomsen-Ellis-Hutton Co.*, 6 Labor Cases 61,498 (not officially reported). Judge FRANK cited four decisions of the Court of Appeals of Maryland as controlling.

In the case at bar the Circuit Court of Appeals for the Fourth Circuit, after careful consideration of the identical decisions relied on by Judge FRANK, has reached the conclusion that they require a different result. Analyzing the reasoning of the Court of Appeals of Maryland, Judge MORRIS A. SOPER, himself a former Chief Judge of the Supreme Bench of Baltimore City, holds that the applicable statute of limitations is found in Section 1 of Article 57 of the CODE OF PUBLIC GENERAL LAWS OF MARYLAND and that actions under the Fair Labor Standards Act are consequently barred after three years.

The petitioners now ask this Court to inquire into this esoteric question of Maryland law.

I.

THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, (1940), this Court, speaking through Mr. Justice STONE, *said* (p. 238):

> "State law is to be applied in federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law'. * * *
>
> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

It is obvious, from even a cursory examination of the opinion of Judge SOPER, that the court below has not disregarded the *Manhoff* case but has, in pursuance of its duty to ascertain from all the available data what the state law is, become convinced by other persuasive data that the highest court of the state would decide otherwise. The opinion of Judge SOPER is explicit on this point. He says (R. p. 77):

> "We have reached the conclusion that it [Judge FRANK's decision] is not in accord with the rules announced in related cases by the Court of Appeals of Maryland, the highest court of the state."

Again he says (R. p. 78):

> "We realize, however, that our decision may not be based upon logical or historic considerations as they

> may appear to us but must be based rather on the Maryland rules as they had been evolved in the decisions of litigated cases in the Maryland courts; but we think that the application of these rules to the case at bar also supports the conclusion we have reached. We make reference particularly to four cases decided by the Court of Appeals of Maryland in the period between 1925 and 1941, to wit: *Mattare v. Cunningham*, 148 Md. 309, *Baltimore v. Finance Corp.*, 168 Md. 13, *Sterling v. Reecher*, 176 Md. 567, and *Insurance Commissioner v. Wachter*, 179 Md. 608."

Had the petitioner seen fit to bring this action in the state courts, the decision of Judge FRANK might have received exactly similar treatment at the hands of any of the judges who presently sit in the courts of Baltimore City. No decision of this Court requires from the Circuit Court of Appeals a deference to Judge FRANK which no Maryland judge is bound to show him.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

If this Court should feel called upon to determine whether Judge FRANK or Judge SOPER has correctly construed the decisions of the Court of Appeals of Maryland, we are confident that the result would be an affirmance of the decision below.

It would unduly extend this brief to analyze the four key decisions of the Court of Appeals of Maryland. For a full understanding of those decisions, it would be necessary to examine the history of the statute which has now been codified as Sections 1 and 3 of Article 57 of the CODE OF PUBLIC GENERAL LAWS OF MARYLAND and of its progenitor, the Act of 21 James I, Chapter 16, Section III. Here it is perhaps enough to point out that the Court of Appeals

of Maryland has generally followed the courts of England in the construction of this statute. Thus the decision in *Gutsell v. Reeve*, 52 T. L. R. 55 (1935), relied on below, is of special significance. There it was flatly held, construing the Act of James, that a suit for statutory minimum wages was not upon a specialty for the purpose of determining the applicable period of limitations.

In *Heyn v. Fidelity Trust Co.*, 174 Md. 639 (1938), the Court of Appeals of Maryland recently said (p. 658):

> "It is a sound and familiar principle of statutory construction that the meaning given to a statute by courts of the jurisdiction in which it was first enacted should be given great weight and where they are consistent with reason and sound logic may be accepted as controlling."

III.

THE DECISION BELOW IS LIMITED IN SCOPE AND LACKS THE IMPORTANCE JUSTIFYING REVIEW BY THIS COURT.

On May 14, 1947, the Portal-to-Portal Act of 1947, Public Law 49, 80th Congress, Chapter 52, First Session, became law. Section 6 of that Act reads as follows:

> "Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—
>
> "(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;
>
> "(b) if the cause of action accrued prior to the date of the enactment of this Act—may be com-

menced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

"(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations."

Thus it is apparent that the ruling of the court below on the question of limitations bears only on causes of action accruing prior to May 14, 1947. Even as to those causes of action, the application of the rule is limited by the provisions of Chapter 518 of the Acts of the General Assembly of Maryland of 1945. That statute expressly limited to three years the time within which suit might be brought under the Fair Labor Standards Act for unpaid minimum wages, unpaid overtime compensation, fees and penalties. The statute became effective on June 1, 1945, and applies not only to all causes of action accruing subsequent to that date but likewise to those causes of action accruing prior to that date on which suit was not filed within one year thereafter. If, as was held in *Swick v. Glenn L. Martin Co.*, 68 F. Supp. 863, aff. 160 F. 2d 483 (petition for certiorari now pending), the Act of 1945 is valid, then the decision in the case at bar will be of significance only in those few cases now pending in the District of Maryland where suit was filed under the Fair Labor Standards Act prior to June 1, 1946.

In this connection petitioner has seen fit to quote certain representations made by the undersigned to the Circuit Court of Appeals as to the effect of the application of the three year statute of limitations on certain suits under the Fair Labor Standards Act in which he appears as counsel for the defendant. In this petitioner appears to have fallen into the error of failing to distinguish between the public interest and the financial interest of particular litigants. The fact that the decision below has eliminated large claims from pending actions in which the undersigned appears as counsel, while of great importance to the undersigned and his clients, has no bearing on the importance of the question in the sense in which the word has always been construed by this Court in acting upon petitions for certiorari.

CONCLUSION.

In the last analysis the petitioner is asking this Court to intervene in a dispute between two able Maryland lawyers as to the true meaning of four decisions of the Court of Appeals of Maryland. Were this Court to respond favorably to such an invitation, it is respectfully submitted that it would find itself embarked on a work of supererogation.

Respectfully submitted,

WILLIAM L. MARBURY,
Counsel for Bethlehem-Fairfield Shipyard, Incorporated, Amicus Curiae.